NO. 89-258 (4)

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

THE STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,
Petitioner,

VS.

AMERICAN STORES COMPANY, ALPHA BETA ACQUISITION CORPORATION, INC., LUCKY STORES, INC.,
Respondents,

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF OF THE CENTER FOR PUBLIC INTEREST LAW IN SUPPORT OF CALIFORNIA'S PETITION FOR A WRIT OF CERTIORARI

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Alpha Beta Acquisition Corporation,
Inc., Lucky Stores, Inc.,
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INTRODUCTION

The Center for Public Interest Law of the University of San Diego School of Law ("Center for Public Interest Law"), as *amicus curiae*, respectfully urges this Court to grant the State of California's Petition for a Writ of Certiorari.

INTEREST OF THE CENTER FOR PUBLIC INTEREST LAW

The Center for Public Interest Law is a non-profit, academic public interest law center specializing in antitrust and regulatory issues. It is vitally interested in insuring effective enforcement of state and federal antitrust laws. One of the primary missions of the Center for Public Interest Law is to promote uniform interpretation of the antitrust laws, especially the remedial provisions of Section 16 of the Clayton Act so that all the citizens of this nation may enjoy the benefits Congress intended by protecting competitive markets.

The Center for Public Interest Law supports California's contention that divestiture, like other equitable remedies, should be available to private plaintiffs, as well as the courts, in cases brought under Section 16 of the Clayton Act. The Ninth Circuit's contrary holding in California v. American Stores, 872 F.2d 837 (9th Cir.1989) is unwarranted by any policies underlying the antitrust laws and poses a serious threat to effective antitrust

enforcement.

ARGUMENT

The Ninth Circuit's decision in this case imposes a categorical bar, under Section 16, to the use of the remedy which this Court has long recognized provides the most effective relief against unlawful mergers. (United States v. E.I. Du Pont de Nemours & Co., 336 U.S. 316, 331, 81 S.Ct. 1243, 1252 (1961).) In effect, the Ninth Circuit has developed a per se laches defense in all private actions seeking to remedy the harm threatened by completed mergers. While the doctrine of laches has a long history as an equitable defense, (Standard Oil Company of California v. United States, 685 F.2d 1322 (U.S.C.C. 1982); Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, U.S. Department of Energy, 683 F.2d 1171 (8th Cir. 1982); Goodman v. McDonnell Douglas Corp., 606 F.2d 800 (8th Cir. 1979),) it is a defense uniquely suited to the nice adjustments to varying factual situations which trial courts are

well equipped to make, and which appellate courts should avoid. The Ninth Circuit's decision here turns these principles on their head. The very fact that the Ninth Circuit's "no-divestiture" rule precludes District Courts from weighing factors such as the diligence of the plaintiff, the presence or lack of prejudice to the merging parties and, most importantly, the threat of injury and availability of alternative, effective relief, suggests the inappropriateness of a per se laches defense.

California was well-justified in awaiting final action by the FTC following its review of the materials provided under the Hart-Scott-Rodino Antitrust Improvements Act before initiating this action. (15 U.S.C. 18a.) Indeed, the Ninth Circuit opinion simply ignores the District Court's finding that California acted as swiftly as "responsibly possible." (697 F.Supp. at 1135.) The Ninth Circuit apparently believes that California should have initiated this suit before the FTC reached even a tentative conclusion that the acquisition of Lucky by American Stores was

unlawful, but could be remedied by the consent agreement its staff proposed. (872 F.2d at 846.) It is difficult to conceive of a ruling which suggests a greater waste of scarce judicial resources than one which compels private parties to ignore the H-S-R review procedures and rush to court for fear of losing the possibility of effective relief.

Two additional factors render a categorical laches defense regrettable. First, an unjustified merger is not simply a matter of retroactive loss. An unlawful merger which cannot be unwound will create continuing prospective damage to consumers. It increases concentration, raises prices, limits consumer choice and affects the fluidity of entry and economic opportunity. (Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); United States v. Von's Grocery Company, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966).)

Second, a public policy that no merger may be unwound provides a strong incentive to spring them secretly and

quickly. Where the only relief may be prospective, it is to be expected that merger tactics will evolve to make prospective remedies ineffective remedies. Moreover, it is likely that in other substantive areas of antitrust law such as monopolization, the "no-divestiture rule" of the Ninth Circuit will preclude the only effective relief in cases brought under section 16.

Finally, the Center for Public Interest Law would point out the plain wording of section 16 of the Clayton Act. The Ninth Circuit has carved out divestiture as a separate species of injunctive relief, so distinct from other remedies that it should be excepted from the plain language of the statute. It is not. In fact, as the range of cases interpreting section 16 shows, divestiture is but one form of relief on a broad continuum of ameliorating options open to District Courts. This range extends from forced sale of assets and compulsory licensing of patents to requiring the use of assets by third parties at fair prices. (Tasty Baking Co. v. Ralston Purina, Inc., 653 F.Supp. 1250, 1255-56

(E.D.Pa.1987); Joseph Ciccone & Sons v. Eastern Ind., 537 F.Supp. 623, 630 (E.D.Pa.1982).) All forms of injunctive relief disrupt an offending firm's post-violation operations -- that is the purpose of injunctive relief. Whether such disruptions are justified should hinge on the efficacy of the particular remedy to redress the perceived harm, not on arbitrary limitations on the availability of options. If a court cannot right a wrong flowing from a violation of the antitrust laws, how is the grant of equitable powers to the courts of any practical use?

Congress intended the courts to be the arbiters of the behavior which violates the substantive provisions of the antitrust laws. That role should not be delegated solely to the FTC or the Department of Justice. The Ninth Circuit's decision in this case makes the courts hostage to the relief decisions made by the FTC without the benefit of public hearing or judicial review. Our basic competition statutes are too precious to hand the keys to effective relief to a single keeper. Indeed, the very purpose of section 16

of the Clayton Act was to insure that the courts remain open to private parties to serve the high purpose of enforcing the substantive provisions of our national economic charter where the federal government is unable to do so. It would be ironic if the vehicle chosen by the Congress to accomplish that purpose precludes private parties from securing the most effective relief available to prevent the harm which flows naturally from mergers which violate section 7 of the Clayton Act.

CONCLUSION

For the foregoing reasons, the Center for Public Interest Law respectfully asks this Court to grant California's Petition for a Writ of Certiorari and reverse the judgment of the Ninth Circuit.

Dated: September 10, 1989

Respectfully submitted,

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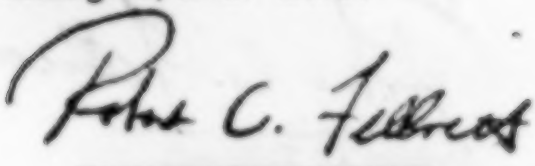

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